In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 429

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 29-35) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 13, 1966. The petition for a writ of certiorari was filed on August 9, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and the Act of July 30, 1946, 60 Stat. 715 (Pet. App. 12).

QUESTIONS PRESENTED

1. Whether the Act of April 1, 1880, 21 Stat. 70, 25 U.S.C. 161, authorizes the payment of interest on

money which Congress provided should be used for surveying petitioners' lands under the Act of April 23, 1904, 33 Stat. 302.

2. Whether the use of receipts from the sale of lands pursuant to the Act of 1904 for the cost of surveying and allotting those lands constitutes a taking of property on which interest must be paid.

STATEMENT

By the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975 (Pet. App. 16–17), certain lands were reserved to petitioners out of an area ceded to the United States. The treaty provided that the lands should be surveyed and marked for the exclusive use and benefit of the confederated tribes, and granted to the President discretion from time to time to cause the whole or a portion of the reservation to be surveyed into lots. No surveying was done under the Treaty prior to the passage of the Act of April 23, 1904, 33 Stat. 302, which provided that the reservation should be surveyed immediately at petitioners' expense and allotted to individual Indians, with surplus lands remaining after allotment to be sold for the benefit of the tribe. The survey was conducted and the expenditures and disbursements thereof, amounting to $190,399.97, were charged against the receipts from the sales of reservation lands held to be surplus. The Court of Claims, in *Confederated Salish and Kotenai Tribes,* 167 Ct.Cl. 405, held that the surveying of petitioners' lands under the Treaty of 1855 was to have been paid for by the government,

and that the Act of 1904, in requiring the tribes to bear the expense of surveying, violated the provisions of the Treaty.

Petitioners now seek to have added to the surveying costs an amount in excess of $450,000 as interest from the date of expenditure. The Court of Claims, citing 28 U.S.C. 2516(a),[1] held that interest was not recoverable because no statute or contract expressly provided for it, and because the use of the receipts did not constitute a Fifth Amendment taking of property on which interest is to be paid under an implied exception to that section.

ARGUMENT

The decision below, notwithstanding petitioners' assertion to the contrary (Pet. 6–8), is in accord with well-settled law as set forth in decisions of this Court and in other decisions of the Court of Claims.

In *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48, this Court stated (at 49):

> It is the "traditional rule" that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract. 28 U.S.C. (Supp. III) § 2516 (a). *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585, 588 (1947), and cases cited therein. This rule precludes an award of interest

[1] "Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof."

> even though a statute should direct an award of "just compensation" for a particular taking. *United States* v. *Goltra*, 312 U.S. 203 (1941). The only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest. *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299 (1923); *United States* v. *Thayer-West Point Hotel Co., supra.*

This case comes within the "traditional rule."

1. Because there is no provision for interest in the jurisdictional Act of July 30, 1946, 60 Stat. 715 (Pet. App. 12), under which petitioners brought suit, they premise their claim on the Act of April 1, 1880, 21 Stat. 70, 25 U.S.C. 161 (Pet. App. 18). However, that statute, which provides for the deposit of money received from the sale of Indian trust lands in an interest-bearing fund, clearly cannot be construed to apply to the receipts in question, for which Congress specifically stipulated a different disposition by Section 14 of the 1904 Act, 33 Stat. 305 (Pet. App. 19). Under the 1904 Act, some of the receipts from the sale of surplus land were to be used to pay surveying and allotment expenses. In so providing, Congress breached the Treaty of 1855 as interpreted by the Court of Claims, 167 Ct. Cl. 405, but it did not thereby incur liability for interest under the older statute. It would indeed be strained to construe the 1880 Act as a direction by Congress to pay interest on receipts which Congress earmarked for surveying petitioners' land rather than for an interest-bearing fund. Such

a construction was properly rejected by the Court of Claims, which held that "the 1904 statute must be read as a *pro tanto* modification of the provisions of the 1880 Act."[2] This holding does not warrant further review.

2. If property is taken under the Fifth Amendment, the "just compensation" to be awarded includes interest, an exception to the prohibition of 28 U.S.C. 2516(a). See *United States* v. *Alcea Band of Tillamooks, supra.* Hence, petitioners contend that the use of the receipts to pay the surveying costs was such a taking and that the decision below conflicts with cases involving the Fifth Amendment (Pet. 6–8). The contention is without merit. First, the receipts in question were used to survey petitioners' land for the purpose of allotting portions of it to individual Indians of petitioners' tribes. The United States neither appropriated the receipts to its use nor received benefit from the expenditure of them. Second, although it is asserted that the decision below conflicts with *United States* v. *Creek Nation*, 295 U.S. 103, that case is clearly distinguishable. In the situation there involved, the government had appropriated Indian land and had disposed of it to settlers and Indians other than of the tribe to whom the land properly belonged. Here, the government

[2] When the two acts are considered together, it is apparent that interest is not authorized, quite apart from any issue of "*pro tanto* modification." The fact is that because the receipts in question were spent, they were simply not in an interest-bearing account over the relevant period. Thus the Act of 1880, 25 U.S.C. 161, is inapposite.

merely sold surplus land for the benefit of the Indians and used, albeit erroneously as it turns out, some of the receipts to defray the costs of surveying and allocating portions of the land to the same Indians. And, finally, the obvious answer to petitioners' argument was noted by the court below (slip op. at 3, Pet. App. 31):

> As stated in the [original] petition, plaintiffs' claim avers the wrongful and unlawful appropriation, use, and expenditure of Indian money to pay for the survey, and asks for damages in the amount so used. There is no reference to the Fifth Amendment or to an eminent domain taking, nor is there a request for interest in addition to the amount so "appropriated, used and expended." The original motion for summary judgment did not characterize the claim as for a Fifth Amendment taking or seek interest. Similarly, this court's prior opinion did not hold that there had been a Fifth Amendment seizure of property.

It is apparent from the above that petitioners' case rests only upon a breach of a treaty. Accordingly, as the court below properly held, petitioners are not entitled to interest. See, *e.g.*, *Choctaw Nation* v. *United States*, 91 Ct. Cl. 320, 402–03, certiorari denied, 312 U.S. 695.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys.

SEPTEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966